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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

DOCKET NO. **683**

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner and Appellant below,

against

WATERMAN STEAMSHIP CO.,
Respondent and Appellee below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, International Terminal Operating Co., Inc., prays that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit for review of the judgment entered in the above-entitled action on November 10, 1959.

Opinions Below

The judgment of the United States District Court, Southern District of New York, in favor of respondent,

entered on September 30, 1958, pursuant to an unreported decision of Judge Noonan, which denied petitioner's motion for summary judgment and granted summary judgment in favor of respondent, is found at pages 36a-38a (R. 36a-38a) of the Appendix to the appellant's brief in the Court of Appeals submitted herewith. The opinion of the Court of Appeals for the Second Circuit affirming the judgment is reported at 272 F 2d 15 and is reprinted herein as Appendix A.

Jurisdiction

The statutory provision conferring jurisdiction on this Court is found at 28 U.S.C. §1254(1).

The Judgment of the Court of Appeals sought to be reviewed was entered on November 10, 1959.

Questions Presented

Does an employer, who, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, makes payments for compensation to and medical expenses on behalf of an injured employee have a lien to the extent of such payments on the proceeds of a judgment obtained by an injured employee against a third party tortfeasor responsible for his injury?

If such lien exists, may it be extinguished by a court in an action by the employee against the third party tortfeasor to which the employer is not a party?

Statutory Provisions

The Fourteenth Amendment to the Constitution of the United States and the applicable provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, are set forth in Appendix B hereto.

Statement of the Case

Jurisdiction was conferred on the District Court in the first instance because the action (1) is between citizens of different states and the amount in controversy, exclusive of interest and costs, exceeds $3,000 and (2) arises under and involves an interpretation of a Federal law, the Longshoremen's and Harbor Workers' Compensation Act.

In 1951, Francesco Mancino, a longshoreman was employed by Jarka Corporation (hereinafter referred to as "Jarka"), predecessor corporation to petitioner, in connection with the unloading of a vessel owned by respondent Waterman Steamship Co. (hereinafter referred to as "Waterman"). In the course of such employment Mancino sustained injuries to his leg and Jarka made payments totaling $5,094.02 for medical expenses and compensation for loss of earnings pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as the "Act").

On February 1, 1952, Mancino instituted an action against Waterman in the Supreme Court of New York, pursuant to Section 33 of the Act. Jarka never became a party to that action. On February 8, 1952, Jarka informed Waterman in writing of its payments for compensation and medical expenses and notified Waterman that it would look to it for "reimbursement of expenses that had been or would be incurred covering compensation and medical care pursuant to the provisions of Section 33 of the Longshoremen's Act, in the event a judgment is rendered or a settlement made" (R. 12a).

Thereafter, on March 17, 1953, Mancino's action went to trial and the trial judge, having heard Mancino's case and having denied Waterman's motion to dismiss for failure to establish a prima facie case, said he wanted the case completed without Waterman calling any wit-

nesses. The trial judge then informed the attorneys for Waterman that if they would not settle with Mancino for $17,500, he would find against them in the sum of $35,000 (R. 21a-22a; Appendix to appellant's brief 21a-22a). He also informed Mancino's counsel that in the event Mancino did not accept $17,500 he would find in favor of Waterman (R. 22a; Appendix to Appellant's Brief, 22a). The trial judge directed Waterman's counsel to send word to Jarka to be in court the following morning "to discuss Jarka's rights". Waterman's counsel did inform an employee of Jarka of the judge's request but Jarka declined to appear inasmuch as it was not a party to the action and because it believed that pressure would be asserted upon it to compromise its undisputed right under the Act to reimbursement for the payments made to Mancino and on his behalf. At no time was Jarka informed of the consequences which might result from a failure to heed the judge's directive.

On March 18, 1953 Waterman's counsel informed the trial judge that Jarka had declined to attend as "directed". In view of the trial judge's conduct, the parties settled for $17,500 and the settlement was in the form of a consent judgment. The next day the judge, antagonized by Jarka's refusal to attend, ordered Waterman's counsel to deliver a check in the sum of $17,500 to Mancino in payment of the entire judgment, without regard to Jarka's asserted lien, and directed Waterman's counsel to have no further communication directly or indirectly with Jarka or any of its employees until judgment had been entered and satisfied (R. 25a; Appendix to Appellant's Brief, 25a).

Waterman, pursuant to the trial judge's directions, delivered to Mancino the entire proceeds of the settlement. Consequently, Jarka was never reimbursed for its payments.

In October, 1956, Jarka instituted the present action in the Court of the City of New York, County of New York. Waterman removed it to the United States District Court of the Southern District of New York. That Court held that Jarka had a lien on its employee's recovery from Waterman, stating: "Plaintiff's lien on the amount of the recovery was equitable. The defendant knew of its existence of the lien even if the ultimate amount had not been determined." (R. 37a; Appendix to Appellant's Brief, 37a.) However, the Court held that the plaintiff's lien was unenforcible because the trial judge in the action to which Jarka was not a party "determined that the defendant had to pay the Longshoreman the money." The District Court, therefore, directed the entry of summary judgment dismissing the action.

On appeal the Court of Appeals for the Second Circuit affirmed, with a dissenting opinion by Judge Lumbard. The Circuit Court did not expressly decide whether Jarka had a lien on the recovery of its employee. It said: "We hold that, in the present case, in view of the fact that appellant [Jarka] does not dispute that appellee [Waterman] was ordered by a state court of competent jurisdiction to disregard the asserted claim of lien and to turn over the entire amount to the employee, plaintiff employer must look only to its employee for satisfaction of its claim for reimbursement". (R. 60a; 272 F 2d 18.)

Reasons for Allowance of the Writ

1. If the opinion of the Court of Appeals for the Second Circuit in the instant case is interpreted as holding that Jarka had no lien on the recovery, it is in direct conflict with the holding of the Court of Appeals for the Third Circuit in *The Etna*, 138 F 2d 37 (1943).

2. If Jarka did have such a lien, the arbitrary act of the state trial judge in ordering the "forfeiture" of the

lien in an action to which Jarka was not a party and of which Jarka was not given proper notice deprived Jarka of his rights without due process of law; such conduct having been recognized by both the District Court and the Court of Appeals as being improper and "judicial bludgeoning" (R. 36a, 37a, 57a, 62a; Appendix to Appellant's brief 36a, 37a).

Argument in Support of Reasons

The stated ground for affirmance by the Court of Appeals was that Jarka had lost any lien which might have existed because Waterman was ordered by a Court of competent jurisdiction (over Waterman) to pay the amount of the judgment without regard to the asserted lien. If the decision below is interpreted as to denying the existence of a lien, it is in direct conflict with what the Court of Appeals in the instant case itself termed the leading case in this field, decided in another Circuit (i.e. *The Etna, supra*). If Jarka was possessed of a lien, its rights could not be extinguished by a court in a proceeding to which it was not given due notice nor made a party.

1. A lien exists under the Act.

The District Court in the instant case held that a lien had been created in Jarka's favor, saying the "lien on the amount of recovery was equitable". (R. 37a; Appendix to Appellant's Brief.) The Court of Appeals did not expressly pass upon the question of whether a lien existed, but the tenor of opinion is consistent with the existence of a lien. *The Etna, supra*, while not expressly terming Jarka's interest a lien, held that an employer (which incidentally was also Jarka) who paid $3,800 under the Act for compensation and medical expenses to its employee who was injured while unloading the vessel,

Etna had a right to intervene and to share *in the specific proceeds* of a judgment received by the employee against the owner of *The Etna*.

Certainly a simple right to be reimbursed by its injured employee would not entitle the employer to intervene in a litigation against a third party and recover part of the judgment against such party. Consequently, if in the instant case, the Second Circuit has denied the existence of a lien or a legal interest in specific monies, its decision is directly contrary to holding of the Third Circuit in *The Etna*. The right to intervene is a procedural right to enforce a legal interest. It does not create such an interest.

The fact that a lien is created under the Act was also noted in the case of *Fontana* v. *Pennsylvania R. Co.*, 106 Fed. Supp. 461 (Dist. Ct. S. D. N. Y. 1952, Weinfeld, J.), which held that an employer who had made compensation payments under the Act had a "lien", to the extent of such payments, on the proceeds of a settlement between the employee and the third party tortfeasor.

> "Thus *the Act treats the recovery as a fund charged* first with the expense of the litigation and then *with the amounts paid for compensation and medical expenses* and the employee becomes entitled only to any excess finally remaining. *There is no reason why a recovery obtained against the third party by the employee rather than the employer should be distributed differently.*" (Pp. 463, 464. Italics added.)

It is submitted that the decision of the Second Circuit in the instant case should not be interpreted in such a way as to create a conflict between its decision and that of the Third Circuit in *The Etna*.

2. The denial of due process of law.

Jarka at all times asserted its right to a lien on the recovery and its acts were entirely and unambiguously consistent with this position. At no time was any attempt made to inform Jarka of the consequences which would flow from its failure to attend the conference. Basic, elementary notice, so often held by this Court to be a necessary prerequisite to jurisdiction, was not given to the petitioner. About this there can be no dispute. Assuming the existence of a lien, the trial judge's demand, transmitted by word of mouth by Waterman's counsel to Jarka's employee, that the attorneys for Jarka appear at the settlement conference, should not affect rights vested in Jarka. The fact Jarka chose not to attend because it had reason to believe that the trial judge would attempt to force it to accept less than the amount to which it was entitled forms no basis to deprive it of its rights.

3. The decision of the Court below does not effectuate the intention of Congress in establishing the right to reimbursement under the Act.

If the decision of the Court of Appeals in the instant case remains the law, employers subject to the Act will continuously be defrauded of their right to reimbursement by employees offering to settle for a lesser sum if the third party will pay the entire amount of the settlement to the employee and ignore the employer's lien. Moreover, intervention in the action between the employee and the third party will not avoid this consequence because such actions may always be settled out of court.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

LOWELL WADMOND,
Counsel for Petitioner.

JOHN M. JOHNSTON,
CHARLES F. G. RAIKES,
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 243—October Term, 1958.

(Argued June 4, 1959 Decided November 10, 1959.)

Docket No. 25429

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Plaintiff-Appellant.

—v.—

WATERMAN STEAMSHIP CO.,
Defendant-Appellee.

Before:

CLARK, *Chief Judge*,
LUMBARD and WATERMAN, *Circuit Judges*.

International Terminal Operating Co., Inc. appeals from an order of the United States District Court for the Southern District of New York, Noonan, *J.*, granting summary judgment dismissing its suit against Waterman Steamship Co. to recover compensation payments made by International to its employee. Affirmed.

WHITE & CASE (John M. Johnston, of counsel), New York City, for Plaintiff-Appellant.

GAY & BEHRENS (Edward J. Behrens, of counsel), New York City, *for Defendant-Appellee.*

WATERMAN, *Circuit Judge*:

This case presents an unusual question under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901-950. Plaintiff is a stevedoring concern. On April 23, 1951, Francesco Mancino, an employee of plaintiff's predecessor, Jarka Corporation, was injured while unloading defendant's vessel, the S.S. *Bicaville*. Jarka made compensation payments to Mancino without award.[1] Mancino then commenced an action against defendant in the New York State Supreme Court. While this action was pending Jarka notified defendant that it had made compensation payments to Mancino and that it would look to defendant for reimbursement for the amount of such payments should Mancino obtain a judgment against defendant or should the litigation be settled. Pursuant to a plan of settlement devised by the judge before whom Mancino's claim was tried, on March 20, 1953 a judgment was entered against defendant and a check for the amount of that judgment was immediately paid over to Mancino.

Plaintiff filed an action for reimbursement against defendant in October 1956 in the New York Courts and the action was removed to the Southern District of New York. Plaintiff has asserted that it had an "equitable lien" on any judgment or settlement to the extent of the compensation payments it made prior to such judgment or settlement, that defendant had been notified of the existence of this "lien," and that therefore defendant, by its act of paying over the entire judgment to Mancino had, despite the "lien," converted that portion of the judgment equal to plaintiff's compensation payment. In an

[1] 33 U. S. C. 914(a) provides that payments shall begin without award unless the employer contests his liability.

unreported opinion Judge Noonan dismissed the complaint on December 30, 1957.[2]

The parties agree as to the precise facts with respect to the settlement procedure required by the New York court. We feel called upon to remark that this procedure was, to say the very least, extraordinary. Mancino's case, heard without a jury, commenced on March 17, 1953. The following day, upon the completion of the presentation of Mancino's evidence, defendant moved to dismiss for failure to establish a prima facie case. The motion having been denied, defendant was prepared to begin a defense based upon the theory that Mancino's injury did not result from any unseaworthy condition of the vessel but instead resulted solely from the negligence of Mancino's fellow workers.[3] The trial judge announced, however, that, irrespective of the merits of the defense, unless defendant would consent to a settlement for $17,500 at this stage of the trial defendant should expect that at the conclusion of the case judgment would be entered against it for an amount that would approximate $35,000. Defendant's trial counsel objected to the obvious impropriety of such a demand; but, after conferring with an officer of defendant, counsel acceded to the demand, well aware of the fact that the trial judge, as trier of fact, had power to bring his

2 Defendant counterclaimed for the total amount of Mancino's judgment alleging plaintiff was obligated to indemnify it, claiming that Mancino's injury resulted from the negligence of Mancino's co-workers. The counterclaim has not yet been adjudicated. Judge Noonan's dismissal order of December 30, 1957 was appealed to this court. We dismissed the appeal for lack of a finding that there was no just cause for delay until the entire case could be adjudicated, a finding required by Rule 54(b) of the Federal Rules of Civil Procedure. *International Term Op. Co. v. Waterman S.S. Co.*, 255 F. 2d 657 (2 Cir. 1958). Judge Noonan modified the dismissal order to include this necessary finding on September 30, 1958. The entry of final judgment on plaintiff's claim for reimbursement, while postponing adjudication of the counterclaim, would seem to approach the limits of a district judge's discretion. *Panichella v. Pennsylvania R. Co.*, 252 F. 2d 452 (3 Cir. 1958); *District 65 v. McKague*, 216 F. 2d 153 (3 Cir. 1954). But the action appears to be adequate under Rule 54(b) to support this appeal. *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U. S. 445 (1956); *Bendix Aviation Corp. v. Glass*, 195 F. 2d 267 (3 Cir. 1952); *Omark Industries v. Lubanko Tool Co.*, 266 F. 2d 5[illegible] (2 Cir. 1959).

threat into actuality. Aware of Jarka's asserted "lien," the trial judge on the opening day of trial had directed defendant to communicate to Jarka the fact that settlement was imminent and that a Jarka representative should be present at court for any settlement conference. Defendant's counsel carried out the court's request, but an authorized official of Jarka replied that Jarka had no intention of being present, from belief that pressure would be exerted upon it to compromise its claim for reimbursement.[3] The following day, March 19, the trial judge ordered that defendant was to consent to judgment for $17,500 to be entered against it on March 20; defendant was to have a check for this amount in court to settle the judgment, and, in the meantime, defendant was to have no further communication with Jarka. In obedience to these explicit directions of the judge, all this was done on March 20.

We are called upon to decide, under the peculiar circumstances here present, what rights of reimbursement an employer may assert against the third party where the employer has notified the third party that it has made compensation payments and when the employee has thereafter obtained a judgment against the third party. The general theory of the Longshoremen's and Harbor Workers' Compensation Act is clear enough. With exceptions not here relevant, an employee is entitled to compensation if he is injured on navigable waters of the United States and is not eligible for compensation under state law, 33 U. S. C. 903. If his employer contests liability, and compensation payments[4] occur as the result of an award, any

3. In view of the doctrine in *The Ling*, 138 F. 2d 37 (3 Cir. 1943), plaintiff's fears that it could be forced to reduce its claim for reimbursement appears to be groundless.

4. As used in this opinion the phrase "compensation payments" includes payments for medical services and supplies under 33 U. S. C. 907 as well as payments under 33 U. S. C. 908 or 909.

right of action against third persons whose negligence may have caused the employee's injury passes to his employer by way of constructive assignment. 33 U. S. C. 914(a), 933(b). When this assignment occurs, and the employer is successful in an action against a third party, the amount by which the sum the employer recovers exceeds the amount of compensation payments it paid out must be turned over to the employee. 33 U. S. C. 933(e). If, however, no award has been made, the employee may bring an action against third persons in his own right. 33 U. S. C. 933(a); but there is no express statutory provision entitling an employer to reimbursement for compensation payments out of the sums so recovered by the employee. However, in keeping with the underlying principle of 33 U. S. C. 933(e) that the employer is entitled to reimbursement for its compensation payments courts uniformly have permitted the employer to intervene in an employee's suit against a third person in order to assert a claim to that portion of any judgment so recovered equal to the amount of compensation payments. The leading case is *The Etna*, 138 F. 2d 37 (3 Cir. 1943). *See* also *Fontain* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (S. D. N. Y. 1952), *aff'd*, 205 F. 2d 151, *cert. denied sub nom. Fontain* v. *Huron Stevedoring Co.*, 346 U. S. 886; *Ruggeris* v. *Liberty Mut. Ins. Co.*, 272 App. Div. 1027, 74 N. Y. S. 2d 428 (1947), *aff'd*, 298 N. Y. 775, 83 N. E. 2d 467;[3] and *cf. Poleski* v. *Moore-McCormack Lines*, 21 F. R. D. 579 (D. Md. 1958). *The Etna* holds that it would be improper for the employee to obtain double recovery by

[3] As the *Ruggeris* case clearly recognized, the employer's rights to reimbursement for compensation payments made under the Longshoremen's Compensation Act is a matter to be determined exclusively by federal law. The reason for dissatisfaction with the reasoning of *Clarke Corp.* v. *Fireman's Fund Indemnity Co.*, 286 App. Div. 148, 142 N. Y. S. 2d 360 (1955), app. den. 286 App. Div. 1003, 145 N. Y. S. 2d 313, app. dism'd 306 N. Y. 909, 131 N. E. 2d 908; a case purporting to decide the question which this opinion leaves open, is the fact that there the court rendered decision without reference to federal law

retaining that portion of the judgment that equals the amounts he has already received by way of compensation payments from his employer. This reasoning in no way supports the contention which appellant here advances. Appellant's *right* to reimbursement is not here in issue. The sole question here is whether an employer having that right, merely by notifying the party sued by its employee that compensation payments have been made, can shift to this third person the entire burden of protecting its right to a portion of any judgment or settlement. We leave open the question whether notification can have this result under normal circumstances.[6] We hold that, in the present case, in view of the fact that appellant does not dispute that appellee was ordered by a state court of competent jurisdiction to disregard the asserted claim of lien and to turn over the entire amount to the employee, plaintiff-employer must look only to its employee for satisfaction of its claim for reimbursement.

Judgment affirmed.

LUMBARD, *Circuit Judge* (dissenting):

I would reverse the order of the district court as the facts and the law do not support Judge Noonan's conclusion that International is estopped from recovering the amount of its compensation payments from Waterman Steamship Co., which it had duly notified.

[6] We note that under present law the employer's right to reimbursement is well protected. Under the *Hima* doctrine he may intervene in his employee's action. Or he may obtain from his employee's attorneys an agreement that they will retain for him from any judgment an amount equal to his compensation payments. See [illegible] S. S. Corp., 16[illegible] F. Supp. 371 (D. M.[illegible]). As a third method of protection it is at least arguable that by virtue of 33 U. S. C. 933(b) an employer, in order to protect its rights of reimbursement, may postpone compensation payments until an award, even though 33 U. S. C. 914(a) provides that payments should begin immediately unless an employer contests his liability.

There can be no doubt that under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901 *et seq.*, International, as Mancino's employer, was required by law to make payments to Mancino for medical expenses and compensation for loss of earnings following Mancino's injury in the course of unloading the S.S. Bienville, a vessel owned by the Waterman Steamship Co., on April 23, 1951.

Subsequently, on January 21, 1952, Mancino filed an election to sue the defendant, Waterman, as the third person allegedly responsible for the injury, and, on February 1, 1952, action was commenced in the Supreme Court of Kings County. To this action, neither International nor its predecessor, Jarka Corporation, was ever a party. However, on February 8, 1952, Jarka advised Waterman in writing of its payments to Mancino and notified Waterman that it would look to it for reimbursement of these monies pursuant to the Longshoremen's and Harbor Workers' Compensation Act "in the event a judgment is rendered or a settlement made."

Thereafter, on March 17, 1953, Mancino's action went to trial in the Supreme Court of Kings County. The Supreme Court justice, apparently exerting pressure on both sides to make a settlement, directed Waterman's counsel to send word to Jarka to be in court the following morning "to discuss the problem of Jarka's rights." This word was conveyed to Jarka and Jarka refused to attend as it had a perfect right to do. What then followed is set forth in the affidavit of Waterman's counsel, as follows:

> "On March 19, 1953, deponent appeared at about noontime before Mr. Justice ..... at a continuation of the trial. Being advised that Mancino would accept $17,500 and Waterman would pay that sum, Mr. Justice ..... directed how the

> case was to be terminated. He directed that, in behalf of the defendant, deponent consent to the entry of judgment in favor of Mancino for $17,500 without costs; that at the time of the entry of the judgment, deponent's firm would be prepared to deliver up a check in payment of the judgment in the amount of $17,500; that, simultaneously with the entry of judgment, Mancino's lawyers would deliver up a satisfaction of the judgment. Mr. Justice ..... directed deponent, as a member of the bar of the court, to have no further communication, directly or indirectly, with The Jarka Corporation or any of its employees about the matter until after judgment had been entered and satisfied." (Name of justice omitted.)

Waterman thereupon chose to follow the "directions" of the justice and a check for $17,500 in settlement of the case was turned over to Mancino in return for a satisfaction of judgment.

Judge Noonan has fittingly characterized the actions of the state court justice as "apparently improper activities of the trial court" and he further commented that these activities "put the defendant in an extremely awkward position vis-a-vis the plaintiff herein."

It is well settled that International, to the extent of the payments made, is subrogated to any rights that Mancino may have against the third party for the injuries on account of which the payments were made. *The Etna*, 138 F. 2d 37 (3 Cir. 1943); *Fontana v. Pennsylvania RR.*, 106 F. 461 (S. D. N. Y. 1952), aff'd. 205 F. 2d 151 (2 Cir. 1953), cert. denied, 346 U. S. 886 (1953); *Jarka v. Fireman's Fund Indemnity Co.*, 286 App. Div. 148, 142 N. Y. S. 2d 369 (1954), appeal denied 286 App. Div. 1003, 145 N. Y. S. 2d 315; appeal dismissed, 309 N. Y. 909, 131 N. E. 2d 908; 33 U. S. C. 933(b). It is also settled that the employer may invoke this right either by intervening in the suit between

the employee and the third party, *The Etna, supra*, or as here, by a separate action against the third party, *Jarka v. Fireman's Fund Indemnity Co., supra*.

Obviously, the state court justice had no right to compel the presence of Jarka or to make any direction on the basis of Jarka's failure to appear and Waterman does not even contend to the contrary. Waterman does argue, however, that it had virtually no alternative but to follow the state court justice's directions. Of course, Waterman could not by any such decision nullify International's rights under the statute. Waterman had the choice of resisting a court order and judgment which may have been rendered by reason of such resistance.

Of course, it is quite possible that Waterman felt that settling the case for $17,500 and running the risk of whatever obligation it might still owe to International was the best result which it could obtain. But it would seem clear to me that no matter what Waterman did, it could not destroy the claim any more than the state court justice could properly prevail upon Waterman or anyone else to effect a settlement so as to destroy International's rights.

For these reasons, I would vote to reverse and remand with the direction to enter summary judgment for the plaintiff for reimbursement of $5,094.02 compensation payments regarding which International had sent notice to Waterman. However, since the merits of Waterman's counterclaim against International for the $17,500 it paid Mancino have not yet been decided,[1] I would also direct that Waterman need not pay over the $5,094.02 to International until the counterclaim has been determined. Cf. *Iravani Motaghi v. Barkey Importing Co.*, 244 F. 2d 238, 260 (2 Cir. 1957).

1. Waterman's counterclaim against International is based on a claim that International's failure to perform properly its stevedoring contract caused Mancino's injury and thus Waterman is entitled to the amount it paid Mancino plus counsel fees, as the measure of damage flowing from this breach of contract. Cf. *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U. S. 563 (1958); *Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Co.*, 350 U. S. 124 (1956).

APPENDIX B

United States Constitution
Amendment XIV

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Longshoremen's and Harbor Workers' Compensation Act

33 U.S.C. §901 *et seq.*:

§914

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

§933

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all

right of the person entitled to compensation to recover damages against such third person.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this title, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

APPENDIX C

[JUDGMENT]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of November one thousand nine hundred and fifty-nine.

Present:

Hon. CHARLES E. CLARK, *Chief Judge*.
Hon. J. EDWARD LUMBARD, Hon. STERRY R. WATERMAN,
Circuit Judges.

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Plaintiff-Appellant,

v.

WATERMAN STEAMSHIP CO.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellee.

/s/ DANIEL FUSARO,
Clerk.

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 683

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

vs.

WATERMAN STEAMSHIP CO.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Statement of the Case	1
Reasons Why the Cause Should Not Be Reviewed	10
Amplification of Reasons:	
Nos. (1) and (2)	11
No. (3)	25
No. (4)	26
No. (5)	27
Conclusion	28

TABLE OF CASES

Alabama Power Co. v. Ickes, 302 U. S. 464	12
Cora Products Co. v. Commissioner of Internal Revenue, 350 U. S. 46	12
Czaplecki v. S.S. Hoegh Silvercloud, 350 U. S. 872	14
The Etna, 138 F. 2d 37	10, 16, 17, 18, 19, 21, 27
Fontana v. Pennsylvania R. Co., 205 F. 2d 151; 346 U. S. 886	19
Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 336 U. S. 271	12
Groesbeck v. Morgan, 206 N. Y. 385	24
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387	11
Patterson v. Hewitt, 195 U. S. 309	24
Rice v. Sioux City Cemetery, 349 U. S. 70	11, 12
Ryan Stevedoring Co. v. Pan Atlantic Steamship Co., 350 U. S. 124	14, 22

PAGE

Texas & N.O.R. Co. v. Brotherhood Ry. & S.S. Clerks, 281 U. S. 548 12

Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515 12

Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U. S. 364 12

Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U. S. 563 14

STATUTES

Title 28 U. S. Code
Section 1332 1

Title 33 U. S. Code
Section 901 ..... 2, 8, 10
Section 933 ..... 2, 26
Section 933 (a) 3, 13
Section 933 (b) 3, 14
Section 933 (d) 14
Section 933 (e) 15
Section 933 (f) 15, 17
Section 933 (g) 15

Title 46 U. S. Code
Section 688 4

OTHER AUTHORITIES

Black, Law Dictionary, 3d Ed., p. 689 23

Pomeroy, Equity Jurisprudence, 4th Ed., V. 4, p. 3417 23

New York Civil Practice Act
Section 193-b 3, 8, 22
Section 474 24

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Statement of the Case

This case involves private litigation wherein the petitioner (a successor corporation to Jarka Corporation) has sought to obtain a money judgment for $5,094.02 against the respondent. The District Court's jurisdiction was based upon diversity of citizenship of the parties and an amount in controversy exceeding $3,000. (Any current issue of this size is no longer within the District Court's jurisdiction since the amendment of 28 U.S.C. 1332 on July 25, 1958, whereby at least $10,000 must be in dispute for diversity jurisdiction. Pub. L. 85-554, § 2; 72 Stat. 415.)

Fundamentally the petitioner's alleged cause for action was bottomed upon certain equitable rights created under stated circumstances by the federal judiciary in 1943, by

an interpretation of Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.* The 86th Congress, 1st Session, so materially changed 33 U.S.C. 933 by Public Law 86-171, 73 Stat. 391, approved August 18, 1959, that the outcome of the petition can have no bearing upon cases currently arising. The first operative fact in the case at bar occurred about nine years ago.

Because the Courts below have recognized that the instant case is so unique from a factual standpoint that they have left "open the question whether notification can have this result under normal circumstances" (Appendix A to petition, p. 15), it is felt that a more extensive Statement of the Case than the sketchy one contained in the petition is necessary to demonstrate that the facts have not really projected the questions presented by the petition, leaving entirely to one side the subsequent amendment of the Act rendering the issue one of interest solely to these two litigants.

The injured longshoreman is not involved in this petition. He received a certain amount of compensation from Jarka under the Act and the full measure of Waterman's liability for his injury.

In 1951, a longshoreman named Francesco Mancino, who was employed by Jarka Corporation (the petitioner's predecessor), was hurt while discharging a cargo from the S. S. "*Bienville.*" The vessel was owned by the respondent. For brevity and clarity, the longshoreman will be referred to herein as "Mancino," the petitioner as "Jarka" and the respondent vessel owner as "Waterman."

During the period of about nine months after Mancino was injured, Jarka paid medical expenses of $2,194, and voluntarily paid to Mancino, compensation payments aggregating $808.57. At that point Mancino decided that he

would avail himself of the election provided by 33 U.S.C. 933(a) and filed with the United States Compensation Commission a notice of his election to sue Waterman, the third person allegedly responsible for his injury. (Such "election" has subsequently been abolished by statutory amendment.)

On February 1, 1952, Mancino sued Waterman in the Supreme Court of the State of New York, County of Kings, and about a week later Jarka wrote a letter to Waterman, saying in effect that it had made compensation payments in an unspecified amount and payments for medical care in an unspecified amount pursuant to the provisions of Section 33 of the Longshoremen's and Harbor Workers' Compensation Act. In the letter Jarka said, "we shall look to you for reimbursement of our expenses * * * in the event a judgment is rendered or settlement made." (15a, 16a)*

Later, in the years 1952 and 1953, Jarka expended further sums for medical treatment of Mancino. These amounted to $1,754.85 (14a). During the entire period from the date of its letter early in 1952 until after Mancino's judgment was satisfied, as explained hereinafter, Jarka followed a calculated program of doing nothing. It made compensation payments voluntarily to Mancino without an award which would have operated as an assignment of Mancino's rights against Waterman under 33 U.S.C. 933(b). (This provision has been changed by later amendment to the statute.) Jarka never sought a reimbursement agreement from Mancino's attorneys (23a, 27a). Jarka never sought to intervene in Mancino's action against Waterman as permitted by Sec. 193-b of the New York Civil Practice Act (27a). Jarka refused to attend before the trial justice during the trial of Mancino's case against Waterman (23a-25a). During the years elapsing since the

* All references are to pages of the appendix to the petitioner's brief in the Court of Appeals, unless otherwise indicated.

satisfaction of Mancino's judgment against Waterman, Jarka has refused to take any steps whatever to collect any money from Mancino in repayment of its expenses and has never instituted any proceedings under the United States Longshoremen's and Harbor Workers' Compensation Act to determine whether the amount Mancino recovered actually exceeds the value of his rights in Compensation (27a, 28a).

Mancino's original complaint against Waterman was based exclusively upon allegations that he had sustained injury through the negligence and carelessness of Waterman. His first cause of action was alleged to have been brought under the Jones Act (46 U.S.C. 688) which obviously was not applicable. The second cause of action contained the same allegations of negligence but apparently differed from the first in that it was based upon the theory that Mancino was a business invitee (respondent's appendix 6a-9a). The factual theory pleaded was that the discharge of part of the lumber cargo in No. 4 hatch created a hole into which the plaintiff was "precipitated."

Late in 1952, by order of the Court wherein Mancino's case was pending, he was permitted to file an amended complaint (respondent's appendix 10a, 11a). In the amended complaint it was not only alleged that the plaintiff's injury was caused by the negligence of the defendant but also that the defendant "failed to furnish plaintiff with a seaworthy vessel" (respondent's appendix 12a, 13a).

Mancino's case was tried to the Court without a jury, beginning on March 17, 1953 (20a). The trial justice knew of Jarka's payment of compensation to Mancino and also that Jarka had paid medical expenses. He knew that Jarka had not sought a reimbursement agreement from Mancino's lawyers and had not taken any steps to intervene in the action. He directed Waterman's counsel to get word to Jarka to attend at court on the following day to discuss Jarka's rights (23a, 24a).

At first Jarka agreed to attend before the trial justice but, on the following day, decided that it would remain firm in its policy of "do nothing" and therefore would not attend (24a, 25a).

On March 17, 1953, Mancino testified, called certain witnesses concerning the nature and extent of his injuries, as well as the circumstances under which he had been injured, and rested his case. Waterman's motion to dismiss the complaint on the ground of the plaintiff's failure to prove a *prima facie* case was denied (20a). At this point occurred the admitted facts which Judge Noonan said "indict the system of judicial administration existing in one of the courts of the state" (36a). The trial justice in Mancino's action directed that the case be disposed of when he denied Waterman's motion to dismiss. He fixed the probable amount of Mancino's recovery at $35,000 if, ultimately, Mancino was to recover. He fixed the value of the case for disposition then and there at $17,500 saying, in effect, that if the plaintiff refused to accept that sum of money, the plaintiff should not be surprised at the end of trial if the Court should find a verdict for Waterman. On the other hand, if Waterman refused to pay $17,500, Waterman should expect a verdict would be entered for Mancino in the amount of $35,000 at the end of trial (21a, 22a).

Waterman's trial counsel was professionally qualified by license and experience to advise Waterman what it should do in view of the "judicial bludgeoning" (17a-19a). Waterman's trial counsel was fully prepared by depositions, documents and available witnesses to contest every phase of Mancino's case (20a, 21a).

Waterman's trial counsel then was in telephonic communication with his client at Mobile, Alabama, explained the whole situation and gave his advice as a practical matter there really was nothing to do but acquiesce in the Court's direction, since the trial court was also the jury

and had it within his power to carry out his expressed threats concerning the ultimate disposition of Mancino's case (22a). Waterman's general counsel approved trial counsel's opinion that Waterman would have to bow to the inevitable (22a, 23a).

While the foregoing problem of Mancino against Waterman was under discussion, the trial court, who was outraged by Jarka's refusal to attend to discuss its rights and interests, directed how the Mancino case was to be terminated. He directed Waterman's counsel to consent to the entry of judgment in favor of Mancino for $17,500, without costs and directed that at the time of the entry of such judgment Waterman be prepared to deliver up a check in payment in the amount of $17,500. He directed Mancino's counsel to be prepared to deliver up a satisfaction of the judgment and he directed Waterman's counsel to have no further communication directly or indirectly with any of Jarka's employees until after the judgment had been entered and satisfied (25a). The judgment was entered and satisfied as directed (25a, 26a, 33a, 34a). As Judge Noonan said:

> "The defendant had no practical alternative but to pay the money as directed." (38a)

In 1954, Jarka paid another medical bill of $336.60 on account of Mancino's injury (27a, 14a), long after the judgment was satisfied.

In October, 1956, three years and seven months after Mancino's judgment was entered against Waterman and satisfied, Jarka instituted this present action in the City Court of the City of New York, County of New York. Waterman removed it to the United States District Court for the Southern District of New York, preferring to have the federal judiciary interpret the United States Longshoremen's and Harbor Worker's Compensation Act as it then existed.

In Jarka's complaint it simply alleged that $5,094.02 was paid to Mancino, who filed an election to sue Waterman with the United States Employees' Compensation; that Jarka notified Waterman and demanded reimbursement by a letter of February 2, 1952, and finally that "despite such notice, knowledge and demand, defendant settled said claim of Francesco Mancino for an amount in excess of said payment of $5,094.02, and paid the entire proceeds of said settlement directly to said Francesco Mancino and failed and refused to make any payment to plaintiff." The complaint contained the further allegation that Jarka had never been reimbursed for its payment of $5,094.02, wherefore it demanded judgment (1a, 2a).

With the exception of corporate status, which indicated diversity of citizenship, and the allegation that Mancino had been injured while working as a longshoreman for Jarka aboard the S.S. "*Bienville*" which Waterman owned, the balance of the allegations of the complaint were put in issue (3a, 4a). The answer contained five affirmative defenses and a counterclaim (4a-8a; respondent's appendix 1a-4a). None of the affirmative defenses was ever abandoned or stricken by motion and the counterclaim remains pending. However, it should be said at this point that Judge Noonan dismissed the complaint on the basis of the third affirmative defense, without consideration of any of the other affirmative defenses and the Court of Appeals has affirmed only that adjudication.

In the third affirmative defense, it was alleged that on about April 23, 1951, while Mancino was employed by Jarka aboard the S.S. "*Bienville*" as a longshoreman, he was injured; that the work was being performed pursuant to an agreement between Jarka and Waterman under the terms of which Jarka, an expert stevedoring firm for many years, undertook, for a valuable consideration, to discharge cargo from the vessel in a safe, skillful and workmanlike manner; that Mancino's injury was caused, in whole or in part, by Jarka's failure to discharge the cargo in a skillful

safe, work-like manner, as the result of which Jarka had breached its agreement with Waterman.

It was stated further in the third affirmative defense that in the years 1951, 1952 and 1953 Jarka was a self-insurer of its obligations to its employees under the United States Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*); that after Mancino's injury, Jarka had made certain payments to or for the use of Mancino, the amounts being unknown to Waterman; that such payments were made voluntarily and without an award, although Jarka knew that it could protect its right of reimbursement, if any, by procuring such a formal award; that Jarka knew Mancino had filed a Notice of Election to sue; that during the years 1952 and 1953, and in no event later than March 11, 1953, Jarka knew Mancino's suit against Waterman was pending in the Supreme Court of the State of New York, County of Kings; that with such knowledge, Jarka did not obtain or attempt to obtain a reimbursement agreement from Mancino or his lawyers; that with such knowledge, Jarka failed to intervene in Mancino's action pursuant to Sec. 193-b of the New York Civil Practice Act and failed to take any steps whatever to protect any right of reimbursement which it had; that at the trial of Mancino's case against Waterman the trial court requested Jarka to appear before him in connection with its claim for reimbursement, which Jarka refused to do (5a, 6a, 7a).

It was alleged further in the third affirmative defense that in order to preclude the possibility of Mancino's obtaining a larger judgment against Waterman, Waterman consented to the entry of a judgment for $17,500 in favor of Mancino on the advice of its trial counsel and in good faith; that the judgment was entered and satisfied on March 20, 1953; that thereafter Jarka, with a full knowledge of all of the facts, failed to take any legal or effectively practical steps to satisfy its claim from Mancino's assets and Jarka "has taken no steps whatever to satisfy

its claim from Mancino's assets." The conclusion of the third affirmative defense is that under all of the facts presented (they were all admitted in connection with the motion before Judge Noonan) a recovery by Jarka would be inequitable and Jarka is barred and estopped by its laches and other conduct (7a).

Judge Noonan disposed of the case by dismissing the complaint in a memorandum which went so far as to assume that Jarka had some form of lien (counsel for the respondent has always urged that Jarka had no "lien" at all) and then Judge Noonan barred Jarka's claim as utterly inequitable. Judge Noonan pointed out in his memorandum that under the admitted facts he could not understand, any more than any one else can understand, what it is Jarka expected Waterman to do in view of Jarka's own deliberate, calculated inaction. He referred to the fact that Jarka had failed to intervene or even to attend the conference when directed by the trial court. Judge Noonan recognized "The apparently improper activities of the trial court put the defendant in an extremely awkward position vis-a-vis the plaintiff herein." He said:

> "A court determined that the defendant had to pay the longshoreman the money; it did so. The plaintiff's presence was requested at a conference before the trial judge; it refused to attend. The defendant had no practical alternative but to pay the money as directed. It was placed in this situation as much by the plaintiff's inaction as by the actions of the trial judge. It would be inequitable to require it to pay a further sum to the plaintiff." (38a)

The Court of Appeals recognized the precise issue as one of equitable estoppel or laches under the unusual circumstances, when it said: "The sole question here is whether an employer having that right (to be reimbursed by its *employee* to prevent the *employee* from having a double recovery), merely by notifying the party sued by

its employee that compensation payments have been made, can shift to this third person the entire burden of protecting its right to a portion of any judgment or settlement. We leave open the question whether notification can have this result under normal circumstances.'" (Petitioner's Appendix, 15). The Court of Appeals affirmed the judgment, carefully limiting the scope of the adjudication to Jarka vis-a-vis Waterman under the peculiar facts of this case.

Reasons Why the Cause Should Not Be Reviewed

(1) The petition points to nothing, either expressed or implied in Rule 19 of this Court, which warrants a review of this case; the petition really seeks to have this Court put a label of "lien" on Jarka's rights against its employee under an interpretation of the law as it once existed (but no longer does), review all of the peculiar facts in the record and then hold, as a *fact* proposition, that Jarka's plan of inaction, did not result in equitable estoppel or a barring by laches, whereupon the cause would be remanded for a consideration of other defenses, etc.

(2) There is no conflict between the decision in the instant case and the holding in *The Etna*, 138 F. 2d 37.

(3) "Due process of law" under Amendment XIV of the United States Constitution is not involved, even remotely.

(4) Congressional action in amending the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, in 1959, has made the adjudication of this case by the courts below, totally inapposite, so far as any current or future litigation may arise under the Act.

(5) The petitioner's fears concerning an employer's rights of reimbursement being ignored are not well founded.

Amplification of Reasons (1) and (2)

Any extensive discussion of the factors enumerated in Supreme Court Rule 19 is deemed surplus. The full impact of the words written by Mr. Chief Justice Taft in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393, appears not to have been diminished by subsequent adjudication. He wrote:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

While the case did contain Constitutional problems, which immediately distinguishes it from the one at bar, and although the exact problem was the dismissal of a writ as improvidently granted rather than the granting of a writ in the first instance, the opinion of Mr. Justice Frankfurter in *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, seems apposite.

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law

> Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341."

In the *Rice* case, subsequent statutory enactment would govern any litigation arising in the future under similar circumstances so that the issues actually tendered by the parties to the suit had become of "isolated significance." So in the case at bar, the later amendment of 33 U.S.C. 933 (presented more fully hereinafter), has rendered such issues as may exist here not significant.

Concurrent findings of fact by the District Court and the Court of Appeals are adopted here as a conclusive basis for decision in the absence of plain error or no evidence at all to support the findings.

> *Virginian Ry. Co.* v. *System Federation, No. 40*, 300 U. S. 515, 542;
> *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367;
> *Texas & N.O.R. Co.* v. *Brotherhood Ry. & S. S. Clerks*, 281 U. S. 548, 558;
> *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477;
> *Corn Products Co.* v. *Commissioner of Internal Revenue*, 350 U. S. 46, 50, 51.

This Court has said in *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 275:

> "• • • A court of law, such as this Court is, rather than a court for correction of errors in fact finding,

cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error (citing cases)."

From the inception of this litigation the petitioner has urged over and over again that it had a "lien." It seems to feel there is some magic in the word which might salvage its utterly inequitable position in seeking to make Waterman pay twice, rather than collecting from its employee once. Accordingly, the petitioner asks this Court to affix the label of "lien" on whatever its rights may have been. The Courts below would not indulge in any purely semantic exercise because it is quite apparent to all, save the petitioner that even *statutory* liens can be lost by waiver or laches or estoppel by conduct.

The actual thrust of the petition can be seen readily when one considers three questions under the old statute, namely; (1) from whence did Jarka receive its alleged rights (2) exactly what were those rights and (3) could they be lost by waiver or estoppel or laches. In presenting our views of the Act in this phase of the case we shall deliberately refer to the provisions of the Act in the past tense, because of the later amendments, the sweep of which will be presented hereinafter under the "Amplification of Reason (4)".

All of Jarka's rights, however they might be described, originated with the former provisions of 33 U.S.C. 933. The statute, as Congress wrote it, did not make any provision for reimbursement of Jarka by Waterman or Mancino or anyone else, as mere inspection of the Act demonstrates. Former 33 U.S.C. 933(a) provided as follows:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy

commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person."

It is difficult to understand how the Congress could have written any clearer that an injured longshoreman, such as Mancino, was given the election to go forward with a third-party claim if *he* chose. It was for his benefit and it was not an election to be made by his employer, in this case Jarka.

Sometimes the injured employee's cause of action against the third person was assigned to the employer. 33 U.S.C. 933(b) provided as follows:

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

If there was such an assignment, then the employer might, pursuant to sub-division (d)

"either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding."

But the whole Act was basically to protect injured longshoremen rather than to swell the coffers of their employers who were self-insured or their employers' insurance companies, if they were insured. See *Czaplecki* v. *S.S. Hoegh Silvercloud*, 350 U. S. 872. That same solicitude for the rights of injured longshoremen probably underlies the dissenting opinion in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.*, 350 U. S. 124, since, with that element removed, the Court unanimously decided *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563.

Where the cause of action against the third party was assigned to the employer by the employee's acceptance of compensation under an award, the Act made detailed provision concerning what should be done with the proceeds recovered. 33 U.S.C. 933(e) provided, in substance, that the employer retain out of the proceeds, the reasonable expenses of the third-party proceedings, the amounts which it has paid for medical services and supplies to the employee, the amounts paid to the injured employee as compensation and the present value of all of the injured employee's future rights as computed under the Act. The statute provided:

> "The employer shall pay any excess to the person entitled to compensation or to the representative."

In short, the statute provided that where the third-party cause of action had been assigned to the employer, it was entitled to retain out of the recovery enough to make the employer whole, if the recovery was larger than the injured man's Compensation rights. *But there was no such provision anywhere in the Act for distributing the proceeds when the employee proceeded with the third-party claim pursuant to his election so to do.*

Where the employee pursued the third-party action, he used to be allowed to do whatever he wished with the claim, without let or hindrance of his employer, with one exception. If he "compromised" the action for an amount less than the compensation he would be entitled to receive, his employer was not liable to pay him any further compensation unless the "compromise" was made with the employer's written approval. 33 U.S.C. 933(g). The Act provided that if the employee proceeded with the third-party case, the employer still must pay to him as compensation "a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person." (33 U.S.C. 933(f)).

In other words, an injured longshoreman might, if he so elected, proceed to judgment in a third-party case with complete assurance that, come what may, he would receive the full value of his Compensation rights. If he obtained it from the third party, he had it. If he did not receive enough from the third party, his employer was required to pay him the balance.

As we have said, the Act made detailed provision for distributing the proceeds in those cases where the employer, having an assignment, obtained a recovery from the third person. All argument and circumlocution to the contrary notwithstanding, it is the bald fact that the Act contained no provision whatever for the distribution of the proceeds where an employee pursued the claim against the third party and had a recovery. So far as the Act was concerned, Jarka never had any right against Waterman or Mancino to collect anything.

Jarka's whole case against Waterman was built upon a doctrine established by the federal judiciary to prevent an employee, like Mancino, from having a double recovery. As analysis of the cases will show, this equitable doctrine was evolved solely for the purpose indicated and it was to be applied in favor of a *diligent employer against his employee where that employee had received a third-party recovery exceeding the compensation value of his case.* Research of counsel throughout the litigation failed to disclose any authoritative state or federal case where the employer, such as Jarka, had any rights whatever against the third party, such as Waterman, after the employee had received the proceeds of a judgment.

There being no direct adjudication on this subject under the old law by this Court, the leading case was *The Etna*, 138 Fed. 2d 37 (C. A. 3, 1942). (Petition, 5-7). There one Mitchell, an employee of Jarka, while unloading cargo from the "Etna" was injured. Jarka began paying him compensation voluntarily under the Longshoremen's and

Harbor Workers' Compensation Act and also paid certain medical expenses, the total payments for both purposes aggregating $3,908.28. Mitchell filed a libel in admiralty against the vessel and owner, charging his injury was caused by a negligent stow. Shortly before the trial began, he filed a notice of election to sue the third party rather than receive compensation. After trial the district court entered a judgment against the vessel in Mitchell's favor for $12,000 (that was more than Jarka's possible maximum liability in compensation under the Act which then had a maximum of $7500; that provision for a maximum having been repealed, Mancino's situation was quite different and one would not know whether the $17,500 was more or less than Jarka's maximum liability, because there has been no determination of the fact under 33 U.S.C. 933(f)).

At that stage of the admiralty proceeding, Mitchell "refused to recognize his employer's claim to subrogation for the compensation and medical payments theretofore paid. Jarka thereupon petitioned the admiralty court for leave to intervene in Mitchell's suit against the 'Etna' and her owner for the purpose of having its right to subrogation and the amount thereof determined and impressed upon the money due Mitchell under his judgment against the third persons."

By agreement of counsel for all of the parties $3,908.28 was paid into the registry of the court to await the further order of the court and the balance of $8,091.72 was paid to Mitchell. The district court allowed Jarka to intervene and directed the Clerk to pay over the fund to Jarka "in discharge of its right to reimbursement." The case involved a fight exclusively between Jarka, the employer, and Mitchell, the employee. The dispute was patently of no interest to the shipowner. (No proctor for the vessel appeared on the appeal—see 138 F. 2d 37, 38.)

The court held in *The Etna* that Jarka had "the right of subrogation which, under equitable principles, attaches

where one, not acting officiously, pays money on account of a legal obligation resting upon him for the imposition whereof another is pecuniarily responsible." The court said that the Act as a whole indicated that the employee should not have *both* his compensation and an award of damages. "This it seems to us, is an implicit recognition that the employer has a right to reimbursement for his outlay under the Compensation Act *out of his employee's adequate recovery from a third person* * * *," whether or not there was an award. (Emphasis supplied.)

The opinion was replete with thoughts of "subrogation" "right to reimbursement out of his employee's recovery from third persons" and "right to reimbursement out of the recovery for the employee's injury." It was strictly a case of Jarka against Mitchell, which was clearly recognized by the Court of Appeals when it held that Jarka was properly permitted to intervene under Admiralty Rules 34 and 42, saying: "The only claim which the employer has against the plaintiff relates to the damages which the plaintiff recovered in his admiralty suit against the third persons responsible for his injury."

There is nothing in that leading case, or, indeed, any federal case following it, that would intimate the court was holding that the employer has any rights whatsoever *against the third person*. Certainly *The Etna* did not hold or suggest that if Jarka had done nothing and the owner of the "Etna" had paid the judgment, the vessel owner would have to pay Jarka, too. As to the argument advanced in *The Etna* that the motion for intervention was sought too late, the court pointed out "The fund in contest is still on hand and in the registry of the Court for the express purpose of abiding decision as to the employer's right to reimbursement therefrom." There, again, the court did not intimate that if the judgment had been paid, Jarka having done nothing to secure or assure its right of subrogation, Jarka could sue the owner of the "*Etna*."

The obvious question appearing in the case at bar is why Jarka deliberately stood aloof from the Mancino controversy until after the trial was over and judgment was entered and satisfied. It is clear that what Jarka tried to do in the case at bar far transcends anything previously sanctioned or even attempted.

In deciding this present case, the Court of Appeals for the Second Circuit understood what the holding in *The Etna* is and explained why it is inapposite. It wrote (petitioner's appendix A, 14) as follows:

> "* * * *The Etna* holds that it would be improper for the employee to obtain double recovery by retaining that portion of the judgment that equals the amounts he has already received by way of compensation payments from his employer. This reasoning in no way supports the contention which appellant here advances. Appellant's *right* to reimbursement is not here in issue. The sole question here is whether an employer having that right, merely by notifying the party sued by its employee that compensation payments have been made, can shift to this third person the entire burden of protecting its right to a portion of any judgment or settlement. * * *"

The only other case, equally inapposite, set forth in the petition is *Fontana* v. *Pennsylvania R. Co.* The petition (p. 7) cites the case only at the District Court level (106 Fed. Supp. 461) for some reason which is obscure. *Fontana* was also treated by the Court of Appeals, 205 F. 2d 151, and by this Court, 346 U. S. 886. In the case at bar the Court of Appeals referred to the *Fontana* case (petitioner's appendix A, 14). Like *The Etna*, *Fontana* adjudged the rights of a diligent employee against a fund held in the registry of the Court.

In the *Fontana* case the injured man agreed to accept $4,000 in settlement of his third party claim. The em-

ployee did not receive the money in satisfaction of a judgment because of the diligence of his employer in protecting the employer's rights. "Huron, libelant's employer, has intervened and asserts a lien against the proceeds of the settlement for the $1,732.54 previously paid by it for compensation and medical expenses. Libelant resists the claim and the court is called upon to determine its validity." The court held that the doctrine of equitable subrogation applied and since the employee should not have *both* compensation and damages, his employer should be repaid out of the fund. The case was affirmed by the Court of Appeals on Judge Weinfeld's opinion, and this Court denied certiorari.

If the settlement or judgment is admittedly larger than the value of the employee's rights in compensation, the basis of resolving a dispute of *employer* vis-a-vis *employee* under the old law as stated in the foregoing cases seems sensible enough, not because the law was overly solicitous for the welfare of the employer (he had only paid what the law required of him as an employer) but because there was no reason in fairness why the employee should have a *double recovery* when the Act required an "election." But Jarka's claim here is not against its employee. Indeed, underlying its position is a thought directly opposed to the federal adjudications. Jarka claims, in effect, that it does not care at all to collect its money from Mancino and he may keep a double recovery if, in fact, it should turn out in further Compensation hearings that the amount of the judgment exceeds his rights under the Act. Obviously, Jarka seeks to avoid those further hearings.

One of the fundamental errors of the petition here is that it fails to recognize that Jarka's rights (whatever they may have been) were derivative, secondary and inchoate. Where the employee elected to and did proceed against the third party, the ultimate value of the employer's equitable rights was purely contingent and at the

beginning of such litigation there were too many contingencies to evaluate or estimate what the employer's ultimate condition would be. If the third party prevailed, the rights were worthless. If the employee received a judgment in an amount less than his Compensation rights, the employer received some measure of indirect benefit and if the recovery was more valuable than the Compensation rights, the employer was made whole by his employee. The employer's fortunes rose and fell with those of the employee. At the beginning of the litigation Jarka could have no greater rights than Mancino. How could anything Mancino did put Jarka in a position *superior* to Mancino? His right against Waterman disappeared with the satisfaction of the judgment. So did Jarka's if it ever had any inchoate rights against Waterman.

It is true that while Mancino's action was pending, Jarka had a right of "subrogation," *i. e.*, a sufficient interest to intervene so that its rights to reimbursement from Mancino (not Waterman) would be *protected, not created.* That interest would continue to the date of judgment and a motion to intervene before the satisfaction of the judgment would undoubtedly have been granted. (Of course, timeliness is vital—see the discussion in *The Etna, supra.*) The payment of the judgment left Jarka's rights *against Mancino* utterly unchanged but, of course, Jarka's right to "security," by intervention had lapsed. That result of inaction could have no legal effect on Waterman. Jarka never had any independent rights against Waterman and nothing Mancino could do would create them. Jarka could have created an obligation against Waterman only by intervention but if chose not to do that. Even with intervention, Jarka's fortunes would follow blindly the fortunes of its employee Mancino.

In order to *protect* its equitable interest against its employee, employers have commonly used in the past Supreme Court Admiralty Rule 34, if the employee's action

was pending in admiralty; Supreme Court Admiralty Rules 34 and 42, if the respondent had deposited the fund by agreement and departed; Section 193-b of the New York Civil Practice Act if the case was pending in the New York State court and Rule 24 of the Federal Rules of Civil Procedure, if the employee proceeded in the Federal court. The latter was the practice followed, for example, in the *Ryan* case, *supra*. (See Record before the Supreme Court of the United States, pp. 319, 320.) Beyond the statutory provisions many employers have received protection by agreement with the employee's lawyer. Jarka willfully did nothing. By its failure to exercise its protective rights, it could hardly create a claim against Waterman where none previously existed. The Court of Appeals recognized the various means available to a diligent employer to protect his rights against his employee (petitioner's appendix A, 15, footnote 6).

From all of the foregoing it is seen (1) that the old *statute* gave no rights of any kind, nature or description in favor of an employer *against the third person*, unless there was an assignment of the cause of action by virtue of an award; (2) the *statute* did not provide for any affirmative rights of an employer *against his employee* where the latter had prosecuted a third party action; (3) the employer had rights created by the Federal courts *against his employee* in equity and based upon the equitable considerations stated hereinbefore; (4) diligence in protecting those equitable rights was obviously required if the employer wished *to assure* his recovery from his employee; (5) as a practical matter employers have protected their equitable right of "subrogation" by using one of the following methods: (a) procuring an agreement from the attorney representing the employee that he, the attorney, would see to it that the employer was reimbursed out of any settlement or the payment of any judgment; (b) intervening in the action so that upon the conclusion thereof the employer would receive a direct judgment; (c) appearing in an action

by intervention where there was a fund deposited in the registry of the Court by agreement of the parties.

The petition fails to disclose that this case has been disposed of below on the sole basis that Jarka's claim, founded on an equitable doctrine created by the judiciary, is entirely inequitable under the peculiar facts and accordingly Jarka has been estopped by its calculated laches (37a, 38a, petitioner's appendix A, 10-15).

In *Black's Law Dictionary* (Third Edition), page 689, it is said:

> "—Estoppel by laches. A neglect to do something which one should do, or to seek to enforce a right at a proper time. *Jett* v. *Jett*, 171 Ky. 548, 188 S. W. 669, 672. A species of 'equitable estoppel' or 'estoppel by matter in pais'."

The general principle is set forth in *Pomeroy's Equity Jurisprudence* (Fourth Edition), Vol. 4, at page 3417, as follows:

> "The true doctrine concerning laches has never been more concisely and accurately stated than in the following language of an able living judge: 'Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief'."

It is immaterial whether Jarka had not belatedly asserted its claim against Waterman, if was barred by statute, for even if it was not barred by the New York statute of limitation, it was barred under the foregoing rule. *See, Patterson v. Hewitt*, 195 U. S. 309 and *Gronbeck v. Morgan*, 206 N. Y. 385.

Waterman was obviously hurt or damaged by Jarka's lack of action for, if Jarka had intervened, Jarka would have received whatever was due it from its employee Mancino and Waterman would never be faced with this law suit. In the present state of affairs, Waterman has been compelled to pay the maximum amount of its liability for the Mancino injury. It has paid the full value of Mancino's case as it was evaluated by the trial court. Just because Jarka did not and does not wish to obtain recompense from Mancino (if in fact Mancino owes Jarka anything) its retention can hardly be an equitable basis for making Waterman pay twice.

Jarka did not extend to the trial court even common courtesy. If Jarka had appeared as the Court had requested, certainly *something* could have been worked out to the satisfaction of all concerned. The Court might even have directed a separate judgment in Jarka's favor under New York C.P.A. 474, but that is conjecture. In any event, equity favors the diligent and Jarka took a deliberate, planned course of doing nothing.

The petition does not even intimate that Mancino against Waterman was an *adversary* proceeding in which Waterman's interest and Jarka's interests identical with Mancino's) was directly *opposed*. The dollar interests of Jarka were antagonistic to Waterman because it was only if Waterman lost the law suit brought by Mancino that Jarka could possibly recover from Mancino any part of the compensation it had paid under the compulsion of the Longshoremen's and Harbor Workers' Compensation Act as it then existed. There never was any warrant in good

sense for taking the burden off of Jarka to protect its interests and putting it on Waterman, Jarka's adversary.

The detailed recitation of what happened during the trial of Mancino's case was presented to the District Court for the purpose of establishing beyond all question that (1) Waterman acted entirely in good faith without any design or plan to injure Jarka in any way or gratuitously to interfere with any of its rights; (2) Waterman's decision was based upon the advice of its counsel, upon whom Waterman had a right to rely; (3) the conclusion of the Mancino case could only be laughingly called "voluntary" or a "settlement" (Judge Noonan has referred to the situation as "judicial bludgeoning"); and (4) Waterman had no *practical* alternative. (Judge Noonan said "the defendant had no practical alternative but to pay the money as directed.")

In view of the foregoing, it is apparent that what this petition really asks is that this Court review all of the facts to determine whether the District Court and the Court of Appeals rightly disposed of this old litigation brought under the former law, on the ground of Jarka's deliberate laches which resulted in prejudice and disadvantage to Waterman. This Court does not sit for that purpose.

Amplification of Reason (3)

In this case, there is not a shadow of a problem under the United States Constitution. Jarka did not lose its rights, whatever they were, simply because a judgment was entered by the New York court in a case to which it was not a party (although it could have been a party, if it chose). Here, in this action brought by Jarka, being represented by counsel, with full opportunity to challenge any fact, and to present its views of the law, it has found that the federal courts will not support its deliberate laches; that such courts will not tolerate inequitable conduct on the part of one who seeks to amplify an equitable right created

by the federal judiciary. Jarka has been condemned by its own calculated conduct. The District Court wrote (38a):

> "A court determined that the defendant had to pay the longshoreman the money; it did so. The plaintiff's presence was requested at a conference before the trial judge; it refused to attend. The defendant had no practical alternative but to pay the money as directed. *It was placed in this situation as much by the plaintiff's inaction as by the actions of the trial judge.* It would be inequitable to require it to pay a further sum to the plaintiff." (Emphasis supplied)

Jarka's failure to receive reimbursement, if any was due, was not "consequent" upon what the trial judge did or did not do in Mancino's action (petition, 4). The result flowed from its own conduct throughout the original Mancino litigation.

Amplification of Reason (4)

On August 18, 1959, Section 33 of the Longeshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 933) was radically amended. The section quoted in Appendix B, 19-20, to the petition is now entirely different. See Appendix A hereof.

Under the new law the injured employee is no longer required to elect whether to receive compensation or seek damages against a third party, as he was under the old law. Acceptance of compensation under an award does not operate as an assignment of the cause of action against a third party under the new law, as it did under the old law. Under the new law the employer and employee become limited partners in those cases where the cause of action is assigned to the employer and an amount in excess of the compensation value of the case is recovered from the third party. The employer makes a profit of

20% of the excess. There is still no provision for what shall be done with the proceeds where the *employee* sues.

What will be the impact of these amendments on current cases? With the drastic change in the law, has the whole rationale of *The Etna, supra*, based upon an "election" which no longer exists, been undermined? Where the employee now sues and has a large recovery, will the federal judiciary now say he must repay the employer? If he must, is he also required to pay a further 20% of the "profit"?

Obviously the whole problem must be approached by the federal judiciary *de novo* and in that new approach to an entirely different statutory scheme the outcome of this case under the old law can have no bearing.

Amplification of Reason (5)

The petitioner's fears (petition 8), that the decision in this case, which is *sui generis* and under a law which no longer exists, will cause employees to settle third party cases so that employers will "be defrauded of their rights to subrogation," cannot really be intended very seriously. It seems to be the vogue in petitions for writs of certiorari to "view with alarm." Yet, amazingly, while most of them are denied, humanity continues to live, eat, breathe and somehow survive. The ships do sail, longshoremen do work and their stevedore employers do prosper. What the petitioner overlooks is that even in the case at bar it has a right to reimbursement from Mancino. If it remains not reimbursed only because it does not want such reimbursement, for unexplained reasons which may appeal to it, how can it reasonably expect the decision of this case to lead anyone anywhere? How can it really worry that everyone will steer his future course by an old chart, uncertain at best, subsequently supplanted, applying to seas other than those to be sailed?

Finally, it appears that even after the briefing and argument in the District Court, the double briefing and double argument in the Court of Appeals and the latter Court's footnote 6, saying (Appendix A, 15) "we note under present law the employer's right to reimbursement is well protected," the petitioner does not understand what intervention in an action accomplishes. At petition 8, it says that intervention will not avoid settlement of a third party claim "because such actions may always be settled out of court." Of course, intervention makes the employer a *party* to the litigation between the employee and the third party. Such a case can never be disposed of by settlement without the agreement of *all* parties to the law suit, including the employer. Had Jarka done what other employers similarly situated do and what it did in *The Etna*, this case could not have arisen.

Conclusion

WHEREFORE, the respondent, perceiving in the petition nothing to warrant review of the facts by this Court, as the petition really seeks, there being no conflict of apposite federal decisions, the Constitutional problem being nonexistent and the statute having been entirely recast by the Congress in 1959, prays that the petition for a writ of certiorari be denied, to which end this brief is

Respectfully submitted,

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Appendix A

28 U.S.C. 1332, as amended by Pub. L. 85-554, § 2, 72 Stat. 415, July 25, 1958:

§ 1332. Diversity of citizenship; amount in controversy; costs:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

33 U.S.C. 933, as amended by Pub. L. 86-171, 73 Stat. 391, August 18, 1959:

"Sec. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

"(c) The payment of such compensation into the fund established in Section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'representative') to recover damages against such third person.

"(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

"(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

"(1) The employer shall retain an amount equal to—

"(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

"(B) the cost of all benefits actually furnished by him to the employee under Section 7;

"(C) all amounts paid as compensation;

"(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under Section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

"(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

"(f) If the person entitled to compensation institutes proceedings within the period prescribed in Section 33(b) the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

"(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if such compromise is made with his written approval.

"(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

"(i) The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer."

New York Civil Practice Act, Section 193-b:

S 193-b. Intervention. 1. Upon timely application any person shall be permitted to intervene in an action, including, but not limited to, an action for a sum of money only: (a) when a statute of this state confers an absolute right to intervene; or (b) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (c) when the applicant has an interest in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief; or (d) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of, or subject to the control of or disposition by, the court or an officer thereof.

2. Upon timely application any person may be permitted to intervene in an action, including, but not limited to, an action for a sum of money only: (a) when a statute of this state confers a right to intervene in the discretion

of the court; or (b) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

3. A person desiring to intervene shall serve a notice of motion to intervene upon all parties who have appeared. The notice shall state the grounds for the motion and shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought. Supporting affidavits may be submitted.